United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Ja 30 interrogatories answered

Ja 34 briefing

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,373

JEREMIAH D. GRIESEMER,
Appellant,

v.

CAPTAIN BRADLEY F. BENNETT,
Director, U. S. Naval Research Laboratory

and

HON. PAUL H. NITZE,
Secretary of the Navy,
Appellees

Sep 14 Ja & statement of appls

745

Appeal From Judgment of the United States District Court for the District of Columbia

JEREMIAH D. GRIESEMER, Pro Se ✓
6416 Portal Avenue
Temple Hills, Maryland

STATEMENT OF QUESTIONS PRESENTED

1. Where an employee presents a prima facie showing that the employer threatened to bring unfounded misconduct charges or that the employer threatened to suspend the employee as a security risk when the employer did not consider the employee a security risk, if the employee refused to resign, is it proper for the Court to conclude that the resignation was "voluntary" in the absence of a contradictory showing by the employer and without a Findings of Fact by the Court specifically contrary to the allegations of the employee?

2. Where the Court has denied defendant's Motion to Dismiss or For Summary Judgment before trial and the evidentiary posture of the case is substantially unchanged by the presentation of plaintiff's case, should the Court grant a motion for Judgment for defendant before defendant's presentation?

3. May the Court, sua sponte, or in response to argument of counsel conclude that a party is guilty of laches where laches was not pleaded? If not, does such a conclusion by the Court presuppose prejudice of the Court towards the remaining allegations of the party charged with laches?

4. Does the fact that he is an attorney or intelligent or experienced in handling such matters render a person immune to coercion or duress?

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United States Court of Appeals

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Appellees

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of the lower Court was invoked under the United States Code, Title 28, Sections 1331, 1332, 2201 and 2202, United States Code, Title 5, Section 1009 and Title 11, Sections 305 and 306, District of Columbia Code 1951 Edition, wherein the appellant, a federal employee,

sought a declaratory judgment and mandatory injunction against appellees, in their capacity as officials of an agency of the Federal Government.

Jurisdiction of this Court is invoked under the United States Code, Title 28, Section 1291, providing for appeals from final decisions or orders of United States District Courts to United States Courts of Appeal.

STATEMENT OF THE CASE

Appellant, Jeremiah D. Griesemer, was a federal Civil Service employee with Veterans' Preference, employed by the Naval Research Laboratory, Washington, D.C. In January 1954 he was recommended for promotion from Scientific Staff Assistant GS-11 to GS-12, but no action was taken. In December 1957, pursuant to the requirements for promotion, he prepared a position description. In June 1959 he brought the position description current and on September 17, 1959 he appealed to the Civil Service Commission the failure of the Naval Research Laboratory to act upon the classification of said position description at the level of GS-12. At the time of his separation from the Naval Research Laboratory, he was notified by the Classification Office of that agency that his appropriate grade was GS-11 and some three and a half months after his separation, the Classification Appeals Examining Office of the Civil Service Commission confirmed that GS grade, a confirmation which appellant did not appeal to the Commission's Board of Appeals and Review (J.A. 35).

On Monday, September 28, 1959 plaintiff reported in as sick and the following day he did not report for work but appeared sometime after noon for a personal reason, at which time Laboratory authorities alleged that he was unable to perform Laboratory duties because of intoxication. On or about October 6, 1959 appellant had a conversation with Harold Kay, employee relations officer of the Naval Research Laboratory, concerning the incident of September 29 and Mr. Kay told him that disciplinary measures were to be taken against him. (J.A. 35-36)

In the Court below, appellant maintained that Mr. Kay told him that if he didn't resign, misconduct charges would be brought against him for being drunk on duty on September 29, 1959 and offered him adequate time to consider the matter. That appellant stated that he was willing to contest misconduct charges on grounds that he was neither drunk nor on duty. That Mr. Kay then stated that the Naval Research Laboratory could bring security charges against appellant then, or at any time, and that if appellant wished to contest the misconduct charges, security risk charges would be brought against him and could be brought against him "at any time". Again Mr. Kay gave appellant sufficient time to consider his course of action, i.e., whether to resign or to contest misconduct charges and security risk suspension (J.A. 2, 36).

That appellant had no fear of misconduct charges, but feared for himself and his family the shame and humiliation of the "badge of infamy" associated with a security risk suspension and that he really believed that he would be charged as a security risk if he resisted, even though the Personnel Division and his supervisor well knew him to be a good security risk (as proven during the three months subsequent to the threats). That thereupon on October 9, 1959 he submitted in writing his resignation giving as the reason therefor "incompatibility with supervisor", effective January 1, 1960 (J.A. 2, 3, 36).

On December 19, 1960 appellant filed an appeal with the Civil Service Commission which was denied and on June 26, 1961 he filed the instant action in which he complained that he had been mis-classified and that his resignation was coerced and was therefore ineffective to separate him from federal service.

Appellant is an attorney, having become a member of the bar of this Court on April 12, 1954, and was familiar with classification and appeal procedures of the Civil Service Commission by reason of his position, which required him to adjust and advise Civil Service employees of his section of the Naval Research Laboratory on classification and other personnel matters (J.A. 37).

Upon trial in the Court below, appellant introduced testimony and evidence to support the allegations of his complaint and rested. Whereupon, on February 12, 1963, without presenting defendants' case to contradict any of the allegations of the plaintiff, appellees moved for judgement, which motion was granted (J.A. 33, 34).

On November 17, 1961, appellees had filed a Motion of Defendants To Dismiss or in the Alternative For Summary Judgment, supported by affidavits contradicting the allegations of appellant set forth in his Complaint (J.A. 5 to 22). The Motion was denied (J.A. 25).

STATEMENT OF POINTS

1. The Court should not have granted defendants' motion to dismiss and entered judgment for defendants without the presentation of evidence by defendants to contradict plaintiff's prima facie case, where the lower Court had already denied a similar Motion to Dismiss or for Summary Judgment with the case in substantially the same posture.

2. The Court should not have based its judgment either wholely or partially upon laches where that affirmative defense had never been set forth by the defendants in their pleadings.

3. The Court should not have concluded that the plaintiff was immune to coercion or duress simply because the Court found that he was an attorney or that he was intelligent or that he was experienced, but should have instead concluded that such a victim is the more susceptible because he can readily understand the gravity of the consequences of the wrongful acts which are threatened.

SUMMARY OF ARGUMENT

If a pressured resignation is to be deemed "voluntary" the alleged threat must be to do something which the threatening party has a right to do, thus bringing about a contractual exchange of one consideration

for another. Wrongful duress arises where the party extracting the resignation threatens to do a wrongful act or an illegal act. In the instant case appellant made out a prima facie case of two separate and distinct wrongful threats: a misconduct discharge; and a security risk suspension. The Court was bound to make findings of fact contrary to the allegations of appellant, could not do so without hearing an appropriate defendant's case, and did not do so.

The Court appears to have been strongly influenced by oral argument of defense counsel that appellant was guilty of laches. Appellant's failure to offer evidence explaining and justifying the delays observed by the Court was due to the lack of necessity to counter a defense which had not been affirmatively pleaded, but this failure clearly prejudiced the Court as shown in the Court's Conclusions of Law numbered 3.

Duress or coercion is founded upon fear in the victim. The fact that the victim is capable of an intelligent analysis of the illegality of duress or coercion or the fact that he is experienced in such matters, even to the point of sophistication, can only make him more respectful of and consequently more fearful of the danger he faces from a wrongful threat.

ARGUMENT

Some courts have held that an order to resign or else be fired for cause, being the will of the employer and not that of the employee, cannot by its nature result in a "voluntary" resignation. The rule here, established by this Court in Competello v. Jones, 105 App. D.C. 412, 267 F.2d 689 and Rich v. Mitchell, 106 App. D.C. 343, 273 F. 2d 78 is that where a resignation is offered as an alternative to involuntary dismissal for cause, there exists a proper exchange of consideration by employer and employee and the employee enters into the agreement voluntarily and his resignation is voluntary and binding. But in both of these cited cases, the employees were threatened with dismissal for a lawful and

proper reason. Where the threatened action is wrongful or illegal, there is coercion or duress and the resignation is involuntary and void. In the instant case, appellant presented the Court with a prima facie case that the threat to discharge him for being drunk on duty was a wrongful threat because he was not drunk and he was not on duty; and a second prima facie case that the second threat, to suspend him as a security risk was both wrongful and illegal in that defendants did not consider him a security risk. The Court entered judgment without hearing any evidence by defendants to justify the first threat or to deny that the second threat had been made (defendants having admitted that a security risk did not exist). In order to justify a conclusion of law that there was no illegal coercion or duress, the Court was duty-bound to make the following findings of fact: 1) appellant was drunk on September 29, 1959; 2) appellant was on duty on September 29, 1959; 3) appellant was a security risk, or, alternatively, no threat of security risk suspension was ever made as alleged. In the absence of any one of the three foregoing findings of fact, there must be a conclusion that the related threat was wrongful or illegal and that the resignation was involuntary and void for having been procured by coercion or duress. And the Court in the instant case made not one of those three findings of fact. Such findings could only develop from the presentation of appropriate evidence in a defendants' case, and this was clearly the basis of the denial on January 11, 1962 of Defendants' Motion to Dismiss or in the Alternative For Summary Judgment by the Court below.

Neither in the Answer of Defendants to Complaint, filed January 22, 1962, nor in any other pleading filed by defendants was there any reference to laches. Under Rule 8 (c) of the Federal Rules of Civil Procedure the defense of laches must be made affirmatively by a responsive pleading (Riley v. Titus, 89 U.S. App. D.C. 79, 190 F.2d 653) and if it is not pleaded, it is waived under Rule 12 (h) (Tornello v. Deligiannis, 180 F. 2d 553). The Court below found appellant guilty of laches as set forth in

its Conclusions of Law number 3 (J.A. 37). Even if this conclusion were not prerequisite to the Judgement below, it is certain to have influenced the over-all evaluation of appellant's case, in the mind of the Court.

In the Ruling of the Court (J.A. 33) appellant is described as an "intelligent, experienced individual, and especially experienced in his particular work at the Naval Laboratory, . . ." and in the Findings of Fact at two points the Court refers to the fact that appellant is an attorney and was familiar with personnel matters. Apparently for these reasons, the Court deemed the appellant incapable of being the victim of coercion or duress. But to know the unlawful features of coercion, to know the humiliation of hearings and innuendoes readily circulated and through experience to understand the callous attitude of the "hatchet man" who often is selected to perform employee relations duties, all go to increase the victim's fear of having such charges brought against him, even though he may be confident that he can defeat them. For instance, if an intelligent U.S. Attorney, with broad experience in the Criminal Division, were to be accosted on a darkened Washington street and requested to submit his wallet at the point of a gun, would it be reasonable to conclude that he had a choice, elected to submit the wallet and the gunman simply accepted a voluntary gift? or should he perhaps refuse to yield, satisfied that at a subsequent hearing his legal position would be vindicated?

CONCLUSION

It seems inescapable that the Judgment in this case was premature, and that in the absence of facts to find which would overcome a prima facie conclusions of duress rendering the resignation involuntary, but influenced by a suspicion of laches which had neither been pleaded by defendants nor treated by plaintiff, the Court sought to justify the Judgement on the theory that an experienced, intelligent attorney is immune to duress or coercion.

Respectfully submitted,

JEREMIAH D. GRIESEMER, Pro Se
6416 Portal Ave.
Temple Hills, Md.

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Enclosure 11, Decision Letter to Jeremiah D. Griesemer From S.L. Elliott, Appeals Examining Officer, dated January 9, 1961 17

Enclosure 15, Decision Letter to Jeremiah D. Griesemer From John E. Blann, Chairman, Board of Appeals and Review, dated April 26, 1961 19

Government's Exhibit B, Affidavit of Harold H. Kay, filed November 17, 1961 20

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JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Jeremiah D. Griesemer,
Plaintiff

v.

Capt. Arthur E. Krapf, et al.,
Defendants

Civil Action No. 2079-61

[Filed June 26, 1961]

COMPLAINT FOR DECLARATORY JUDGMENT AND MANDATORY INJUNCTION

1. Jurisdiction of this Court is based upon 28 U.S.C. 1331, 1332, 2201, 2202, 5 USC 1009 and 11 D. C. Code 305 & 306.

2. Plaintiff is a citizen of the U. S. and a resident of Maryland and was employed at the Naval Research Laboratory in the classified Civil Service as a permanent preference eligible appointee and brings this action in his own right. Defendant Krapf is the Director, U. S. Naval Research Laboratory; Defendant is the Secretary of the Navy.

3. On or about October 7, 1959 Harold Kay, Employee Relations Officer, informed plaintiff orally that unless plaintiff resigned as Scientific Staff Assistant, GS-11, Solid State Division, Naval Research Laboratory, a charge of misconduct would be brought against plaintiff by his supervisor, Richard L. Dolecek. At that time Kay advised plaintiff as to his rights to 30 days' notice, a hearing, etc. under the Veterans Preference Act of 1944 and gave plaintiff adequate time to consider the matter.

4. On or about October 8, 1959 plaintiff notified Kay that he would accept and oppose the letter of charges, denying misconduct. Where-

upon Kay said that if plaintiff didn't resign, he could "forget about" his veterans' preference rights because that would result in immediate suspension as a "security risk"; he said further that NRL could and would bring security risk charges at any time if plaintiff resisted the forced resignation. Later that day plaintiff's immediate supervisor, Richard L. Dolecek, confirmed Kay's wrongful and unlawful threats as set forth in this paragraph.

5. On or about September 17, 1959 plaintiff had filed a Classification Appeal with Civil Service Commission protesting his GS-11 as inadequate and inaccurate. That appeal was denied by the Commission (on March 17, 1960 when it appeared to be moot) as the result of information received from NRL. Said information was based upon a combination of half-truths, false implications, and false statements made by plaintiff's supervisor in collaboration with the Personnel Division. Plaintiff's supervisor is thoroughly knowledgeable in classification matters and he knew and had repeatedly stated orally and in writing that plaintiff's proper classification was "Scientific Staff Assistant, GS-12", but NRL told the Commission it should be "Administrative Services Officer, GS-11", and a weak GS-11 at that.

6. Plaintiff had no fear of misconduct charges as set forth in 3. above. But he feared for himself and his family the shame and humiliation of the "badge of infamy" associated with a security risk charge. He verily believed from their past performance and from the very fact that they would dirty themselves in order to obtain their objective that his supervisor and the Personnel Division would suspend him as a security risk and make every attempt to concoct a justification. He further verily believed that if he resigned and they thought themselves successful, they would give no derogatory information as to his security qualifications in any future routine National Agency security investigation of plaintiff and they would thereupon feel personally estopped to make any false derogatory statements about him.

7. Under protest personally delivered orally to defendant Krapf,

plaintiff resigned on October 9, 1959, effective January 1, 1960.

8. Plaintiff's supervisor and the Personnel Division knew that in his 11 years as an NRL employee in a "sensitive" position he had, along with all others in similar positions, been subjected to exhaustive Civil Service and Naval Intelligence investigations and clearances; and in addition that he had been exhaustively checked by the FBI for "Q" Clearance in order to enable him to handle A.E.C. Secret Restricted Data. That they knew that he was not a security risk was proven beyond doubt in the three months from the time of their threats until the effective date of his "resignation": during that period he continued to be among the few employees authorized to withdraw classified data from central NRL files, he continued to be among the restricted number of employees with "unrestricted" Laboratory passes giving access to the Laboratory at any hour of any day of the week and he continued to be one of the three or four employees of his Division with access to the combinations of all Division safes and vaults and the military secrets contained herein; without making use of the threatened suspension, plaintiff's supervisor could have withdrawn and in fact was obligated to withdraw the foregoing authorities from plaintiff had the supervisor had any reason to doubt plaintiff's security trustworthiness, and he needed no higher approval of such action.

9. During 1960 plaintiff unsuccessfully sought employment in both private industry and Government in laboratories and other activities where security requires a "National Agency Check"..One agency, unknown to plaintiff, submitted his security questionnaire for a National Agency Check while still negotiating with plaintiff about employment. This fact was discovered by plaintiff on December 9, 1960 and confirmed by the Civil Service Commission on December 13 upon inquiry. Plaintiff knows from his own administrative experience that in the course of that investigation, his supervisor and Personnel Division had to be contacted for possible derogatory information and he verily believes that no such information was given to the investigator.

10. Plaintiff has exhausted his administrative remedies, having filed an appeal with the Civil Service Appeals Examining Office on December 19, 1960 (denied 1/9/61) and the Civil Service Board of Appeals and Review on January 14, 1961 (denied on April 26, 1961).

WHEREFORE, the premises considered, the plaintiff prays:

1. That an order be entered herein declaring the said alleged "resignation" to have been procured by duress and therefore illegal, null and void and setting aside the action of the U. S. Naval Research Laboratory separating plaintiff from his position on or about January 1, 1960.

2. That said order further declare that plaintiff's classification at grade 11 was confirmed by the Civil Service Commission as the result of fraud and therefore administrative error on the part of the Naval Research Laboratory and that the proper classification should have been Scientific Staff Assistant, GS-12 from the date of submission of a position description.

3. That a mandatory injunction issue directing the defendants to reinstate plaintiff on the rolls of the Naval Research Laboratory retroactive to January 1, 1960 with full pay and leave, and further directing the retroactive reclassification of plaintiff as "Scientific Staff Assistant, GS-12" as of the date of plaintiff's submission of his position description.

And for such other and further relief as to the Court may seem proper.

/s/ Jeremiah D. Griesemer
Plaintiff

[Filed November 17, 1961]

MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Come now the defendants by and through their attorney, the United States Attorney for the District of Columbia, and move this Court to dismiss the complaint for failure to state a claim for which relief may be granted or in the alternative for summary judgment in this case for the reason that there exists no genuine issue of material fact and that defendants are entitled to judgment as a matter of law.

Attached hereto and made a part of this motion are a certified copy of official documents of the Civil Service Commission identified as Government Exhibit A; affidavits identified as Government Exhibits B and C and official documents of the Navy Department identified as Government Exhibits D and E.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Byron K. Welch
Assistant United States Attorney

[Certificate of Service]

[Filed November 17, 1961]

STATEMENT OF MATERIAL FACT AS TO WHICH THERE IS NO GENUINE ISSUE

1. Plaintiff was employed as a scientific staff assistant, GS-11, at the Naval Research Laboratory at Washington, D. C., until January 1, 1960. He was in the competitive service and was entitled to the benefits of the Veterans Preference Act of 1944, as amended.

2. On October 9, 1959, plaintiff signed a resignation from his position to become effective January 1, 1960, giving as a reason incompatibility with supervisor.

3. Plaintiff's resignation was immediately accepted by the Naval Research Laboratory.

4. Plaintiff filed an appeal on December 19, 1960, of the action of the U. S. Naval Research Laboratory in processing his separation.

5. The Appeals Examining Office of the Civil Service Commission issued its decision on January 9, 1961, finding that plaintiff's resignation had been voluntary and that therefore there was no adverse action of the employing agency from which an appeal would lie.

6. Plaintiff appealed the decision of the Appeals Examining Office to the Civil Service Commission Board of Appeals and Review on January 14, 1961. Plaintiff submitted further material in connection with this appeal by letter on March 7, 1961.

7. The Civil Service Board of Appeals and Review affirmed the decision of the Appeals Examining Office on April 26, 1961.

8. The present action was filed on June 26, 1961.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Byron K. Welch
Assistant United States Attorney

[Enclosure 1, Gov't. Ex. A]

U.S. NAVAL RESEARCH LABORATORY
WASHINGTON 25, D.C.

17 September 1959

The Commissioners
U.S. Civil Service Commission
Washington 25, D.C.

Subject: Appeal of administrative inaction

Gentlemen:

Beginning in the spring of 1954 the undersigned reported on Form No. PRNC-Gen-163 (revised 5-53), that his position was necessary and was inaccurately described. This report was countersigned by the Division Head and the Personnel Officer of the Naval Research Laboratory. In each year thereafter until the present, the same form has been completed in exactly the same manner.

In January 1954 the undersigned was recommended for promotion from Scientific Staff Assistant, GS-11 to Scientific Staff Assistant, GS-12 unanimously by the Electricity Division Promotion Board, one member of which was Dr. R.L. Dolecek. Shortly thereafter the Naval Research Laboratory was reorganized and the Electricity Division became the Solid State Division. Dr. Wayne C. Hall, Superintendent of the Electricity Division was promoted to Associate Director of Research and Dr. R.L. Dolecek was made Superintendent of the Solid State Division. The undersigned did not prepare a position description in accordance with the recommendation of the Electricity Division Promotion Board. In the spring of 1955 or 1956 the undersigned submitted a request for promotion to the Solid State Division Promotion Board which was approved unanimously by the new organization, and which was approved by the new Division Head, Dr. R.L. Dolecek.

Attached please find an assortment of satisfactory efficiency ratings.

In the early fall of 1957, the undersigned was selected, first by the Naval Research Laboratory and then by the Navy Department to represent the Navy Department in the Management Intern Program. The undersigned undertook this program in accordance with the directions of Dr. Charles A. Ullman and upon completion of approximately one month of training, Dr. Ullman advised the Navy Department Training Officer that the undersigned had been absent without explanation for a period of three days (copy attached); this was an honest error. On October 9, 1957 the said Dr. Ullman wrote an official letter to the Naval Research Laboratory stating that the undersigned had been absent for a period of three days; this letter was prepared by Dr. Ullman after Dr. Ullman had been advised by his secretary, Miss Judith P. Wolfson and his assistant, one Mr. de Maurier, that he was mistaken. This letter, copy of which is attached herewith, was no longer an honest mistake, but upon signing became a deliberate falsification.

In a letter addressed to the Commanding Officer of the Naval Research Laboratory, Dr. Ullman questioned the desirability of continuing the undersigned in the Management Intern Program. At the same time Dr. Ullman requested that no adverse action be taken against the undersigned by the Laboratory.

In January 1958 the undersigned submitted a position description which has not been acted upon by the Classification Branch, Personnel Division, Naval Research Laboratory. Apparently on June 3, 1959 this position description was submitted to the Classification Branch with no recommendation as to GS level. Had administrative action been taken, the undersigned would have been promoted from a salary of $8230 to a salary of $9530. Failure to take such action was thus a "fine" amounting to $1300 per annum.

The undersigned with ten years of experience at the Naval Research Laboratory considers that his position is closely approximate to that of Misters V. Piatt, position description No. 1168-51, GS-12; A.O. Park,

position description No. 0097-52, GS-12 and R.S. Werner, position description No. 0577-51A1, GS-12.

The undersigned as set forth in attached efficiency ratings, believes that his performance has been appropriate to his assignment. No duties and no responsibilities have been withdrawn from the assignment of the undersigned.

The undersigned appeals to the Civil Service Commission the failure of the Naval Research Laboratory to allocate his position to the GS-12 or GS-13 level and the resultant "fine" imposed upon him.

It is requested that the enclosures be returned to the undersigned.

/s/ Jeremiah D. Griesemer

[Enclosure 8, Gov't. Ex. A]

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D.C.

September 17, 1959

Mr. J.D. Griesemer
6416 Portal Avenue
Washington 22, D.C.

Dear Mr. Griesemer:

We have completed our review of your appeal for a higher classification of the position you recently occupied in the U.S. Naval Research Laboratory.

After consideration of all the facts contained in the record and, based on comparisons made with classification standards published by the Commission, we have concluded that your position should be classified in grade GS-341-11. Your appeal, accordingly,is denied.

As indicated in your position description, you functioned as Staff Assistant to the Superintendent of the Solid State Division. In that capa-

city you were responsible for administrative matters for a major laboratory organization. Embraced within your sphere of operations were such activities identified as fiscal, personnel, and program administration, and a variety of miscellaneous functions.

A review of your duties led to the conclusion that your position should be placed in the GS-341 Administrative Assistant and Officer Series. The definition for this series includes positions the duties of which are to perform, advise on, or supervise planning, organizing, analytical, or equivalent work not of a clerical nature necessary in providing or negotiating for two or more administrative functions or services (e.g., budget, personnel, management analysis and improvement, library, security, safety, etc.) necessary for the internal administration, operation, and functioning of an organization when the paramount qualification requirement is subject-matter or functional knowledge of and skill in executing, such administrative functions or services.

Your duties, while requiring a familiarity with the technical and scientific aspects of the programs in your organization, do not demand application of a professional background to carry out the work. One or two of the examples given in your description border on a technical or subprofessional type of participation and do not require knowledge inherent in a full scientific or professional background.

An analysis of your work indicated that the grade controlling features of your position pertained to the management improvement and advisory services you performed. Some examples of this work given in the description include such activities as working with Branch Heads, providing advice, recommending and taking action with respect to problem consolidations or coordination of projects, analysis of functions, budget requirements, personnel matters, preparation and editing of progress reports, etc.

Since standards have not been published for the GS-341 series, reference has been made to the GS-303 Management Analysis Series. The latter offers sufficient criteria and is considered the most appropri-

ate available for evaluating your position. Typical assignments at the GS-12 level, as contemplated by the standards, require analysis of a large number of interrelated organizational entities or a group of many complex processes or functions or an important function of a department or other large agency. In addition, they require analysis of work processes or functions which are complex in that they (a) Comprise substantive operations which are predominantly professional, scientific, highly technical, or of equivalent subject-matter and operational complexity; (b) Embrace a wide variety of kinds of work processes, functions, organizations, and programs; (c) Tend to change in one or more major operational particulars at frequent intervals; (d) Are performed in organizational entities which require frequent and substantial changes as the result of shifting workloads, changing programs, technological changes, budgetary considerations, etc.; (e) Include a large number of work processes which are nonrepetitive in nature, i.e., consist of a large proportion of work items which vary substantially from one to another of the same type as well as from one type to another; and (f) Are closely interrelated or interwoven with programs, procedures, or objectives of other major organizational entities or agencies.

The assignments require study and planning of coordination with other processes, programs, and organizations (e.g., other agencies,field offices of the same agency, State or local governments, or private business) which is essential because of the nature of the work processes, programs, and organizations to which assigned, and such coordination problems are difficult and complex because of the breadth and variety of the typical assignments.

Inasmuch as your activities are generally confined to one organizational unit, your responsibilities, we find, do not have the breadth, scope, or intensity of the studies visualized here. We must conclude from the comparison made that your position does not measure up to the GS-12 level.

Placed against the GS-11 level, your work assignments show some

weakness for this grade. For example, assignments typically require analysis of a large number of interrelated organizational entities or a large number of processes, functions, or procedures, and they are important because of their potential effect on a number of agency processes or organizations. The assignment require analysis of work processes or functions which (a) Are of greater complexity than are clerical or equivalent processes; or include a large proportion of clerical functions or operations and also a small proportion of professional,scientific, or highly technical functions or operations which constitute problems for the management analyst on a regular and substantial basis; or include any combination of professional, scientific, or highly technical functions or operations which present problems to the management analyst of greater complexity than do clerical functions but which are also less difficult than the problems normally encountered in professional, scientific, or highly technical programs (e.g., the function includes very narrow and closely related aspects of a very few professions; or the function includes a restricted aspect of a professional field interwoven with a large clerical operation); and (b) Are comprised of a variety of kinds of work processes, functions, organizations, and programs; . . . , etc.

Much of the weakness in this area of your position, we believe, may be overcome by the fact that you were the top administrative man in your organization, that your work required of you a familiarity with the scientific subject matter fields with which your unit is concerned, and that your work extended, in addition to management analysis and improvement, to budget and personnel matters. We concluded that these factors compensated for the greater complexity and breadth of the assignments portrayed above. As a consequence, we are of the opinion that your position warrants recognition in grade GS-11.

We regret that a favorable decision on your appeal was not possible.

Sincerely yours,

/s/ Asa M. McCain, Chief
Classification Appeals Office
Bureau of Inspections and
Classification Audits

[Enclosure 9, Gov't. Ex. A]

6416 Portal Ave.
Temple Hills, Md.
December 19, 1960

Appeals Examining Office
U.S. Civil Service Commission
Washington 25, D.C.

Re: Appeal of Separation Action

Gentlemen:

This is to appeal the action of the U.S. Naval Research Laboratory in processing my separation effective January 1, 1960 as the result of my "resignation" dated October 9, 1959. Said alleged "resignation" was extracted from me under extreme duress or by trick, i.e., the threat that if I should insist upon my rights under Section 14 of the Veterans' Preference Act of 1944 or should protest the action, I would be suspended immediately as a Security Risk. As will be set forth below, this threat was a continuing one which was not effectively terminated until December 13, 1960. In bringing this appeal I should bring to your attention at the outset the fact that I am fully cognizant of and have no quarrel with the reasoning and rulings in Rich vs. Mitchel and similar cases, but consider my case clearly distinguishable.

I was employed as a personnel clerk, GS-5 at NRL in January, 1949. By way of promotion, I reached the position of scientific staff assistant, GS-11 in October, 1951; between February, 1954 and September, 1957 I was promised promotion to GS-12 (the truly correct grade of duties and responsibilities being performed) on several occasions but for various reasons such promotion was never effected. Upon my return from a Civil Service Management Interne program in the fall of 1957, my supervisor, Dr. R.L. Dolecek, Superintendent, Solid State Division, flatly refused to process my position description although he had annually gone on record as stating that the existing description was inaccurate and under-graded since 1954. Quite simply, over a period of several years I had managed to alienate a number of people at NRL on behalf of my

division but had always had the backing of my supervisor; in the fall of 1957 he was finally persuaded to get rid of me. I failed to act upon Dr. Dolecek's suggestions that I find other employment more suitable to my abilities.

One day early in October, 1959 I was too sick to report for work, suffering from violent headache and stomach disorder and neither aspirin nor prozine tablets gave me relief. At about noon I remembered that it was the last day on which I could file some papers in a personal real estate matter (irrelevant to my employment) and I was determined to get them from my office and file them regardless of my physical condition. I took further medication and on my way to the office stopped at a restaurant for a drink and a sandwich. At the office I told the division secretary that I was not available for Lab business, would get some personal papers, file them and return home to bed. My supervisor demanded a physical examination and the medical officer found me "intoxicated". (Much later, I was told by my physician that any amount of alcohol in combination with prozine would cause the observed effect.)

Thereafter, both my supervisor and Mr. Harold Kay, the Employee Relations Officer, told me that unless I resigned, a letter of charges would be brought against me to bring about my discharge for being drunk on duty. Mr. Kay very carefully advised me of my rights under the Veterans' Preference Act of 1944 and granted me plenty of time in which to consider the resignation. Later I told Mr. Kay that I would accept and oppose the letter of charges and that at my hearing I would maintain first that my apparent intoxication was not brought about as the result of misconduct, and second that I was on leave at the time and not in a duty status. At this point Mr. Kay's very proper and very considerate tune changed; he apparently thought my defenses to the charges were valid. He told me I could forget about my veteran's rights because if I refused to resign, I would be suspended immediately as a Security Risk. Later, my supervisor confirmed the threat in urging me to resign by referring to the "unpleasantness" of having been so suspended. Both Mr.

Rule
41 b
Dolecek's hearing
19207
Dec 20-65

Kay and Dr. Dolecek made it clear that NRL would try to make the security charge stick if it had to be used, although both of them have known me for a number of years and both of them know that there isn't even a remote possibility that I am a security risk.

I had no fear of misconduct charges; when faced with the choice of the charges or resignation, I elected to have a hearing on the charges. But anyone familiar with current government history would be a fool to take a chance on a security risk suspension, even when such suspension is unfounded and wrongful. Wilful men in positions of trust can combine half-truths, innuendos and outright false statements to bring about doubt; and even though the victim may succeed in proving himself innocent, he must forever carry with him the stigma of once having been suspended as a security risk. When my supervisor and the Personnel Division were criticized for improper classification of my position, they joined forces and through a combination of half-truths, innuendos and outright false statements, suddenly made my duties and responsibilities appear to be those of Organization & Management at a low GS-11 level. It took no immagination at all to conclude that they could again join forces to at least justify questioning my security, thus justifying a suspension.

I had no choice but to resign without protest of a formal nature.

That the threat of suspension was wrongful and unlawful and known by Mr. Kay and Dr. Dolecek to be wrongful and unlawful was proven during the following eleven weeks. Under the law the Naval Reseach Laboratory as a "sensitive" defense agency has the unique priviledge of instant suspension of one suspected of being a security risk (it should be said that the privilege carries with it the responsibility not to abuse it). Between October 9 and December 31 I continued to be among the few employees who have the right to withdraw classified data from central NRL files; I continued to be among the few employees who have unrestricted passes giving them access to the Laboratory at any hour of any day or night of the week; I continued to be one of the three or four Division employees who had access to the combinations of all the vaults and

safe-files in the Division. These rights could have been taken from me by my supervisor alone and without suspension, but they were not. Yet had I insisted upon my rights under the Veterans' Preference Act, I would have been suspended on October 9 as a security risk! ! !

It should have been a simple matter to get the Naval Research Laboratory into its present posture with regard to this case, thereby enabling me to file this appeal earlier. I needed only to obtain employment in another position requiring security clearance, thus requiring my new employer to request a routine National Agency Check. In the course of such a check bringing my clearance up to date, NRL would be contacted and both my former supervisor and the Personnel Division would feel perfectly safe in truthfully telling the investigators that they had no reason to doubt my loyalty, truthfulness, honesty, integrity, etc. Once having given such information, their own individual security qualification would be jeopardized by a subsequent reversal of attitude. But both Mr. Kay and Dr. Dolecek made it clear to me that if this appeal or protest were already on file and they knew of it, then they would attempt to damn me in order to justify or appear to justify their wrongful and unlawful action, as set forth above.

Unfortunately my applications have met with little interest in most agencies. But at the end of September of this year, the Diamond Ordnance Fuze Laboratories seriously considered employing me in a position requiring secret clearance, and unknown to me the security information I had given them was forwarded by them to the Civil Service Commission with a request for a National Agency Check, although they had not employed me. On December 13, I checked with Mr. H. Zierdt of the Clearance of Records Office, CSC and he confirmed the fact that the National Agency Check had been requested and completed. Before going to his office, I had no way of knowing of this investigation other than by hearsay from a not-necessarily reliable source on the previous Friday. The threat (or promise) of wrongful security risk allegations had hung over me from October 9, 1959 until December 13, 1960, but the danger

carried with it is now negligible, and an appeal is safely in order.

The Civil Service Commission is hereby respectfully requested to cancel the action of separation by the U.S. Naval Research Laboratory and to order my retroactive reinstatement.

Very truly yours,
Jeremiah D. Griesemer

[Enclosure 11, Gov't. Ex. A]

UNITED STATES CIVIL SERVICE COMMISSION
Bureau of Departmental Operations
Washington 25, D.C.

File DAE:MES:gdc

January 9, 1961

Mr. Jeremiah D. Griesemer
6416 Portal Avenue
Temple Hills, Maryland

Dear Mr. Griesemer:

Your appeal of December 19, 1960 protesting your separation by resignation from the position of Scientific Staff Assistant, GS-11, $8230 per annum, U.S. Naval Research Laboratory, Department of the Navy, Washington, D.C., effective January 1, 1960 must be denied.

Your appeal is predicated on the proposition that you were "tricked" into resigning or that your resignation was extracted from you under duress and therefore you wish to appeal for corrective action. Section 14 of the Veterans' Preference Act and all other laws which authorize appeals to the Civil Service Commission provide for the acceptance of appeals from employees who are adversely affected by an action of an administrative officer taken against the will of the employee concerned. These laws do not provide for the acceptance of appeals from employees who resign or voluntarily relinquish their positions.

You imply that under the circumstances surrounding your resignation there was no alternative other than to resign. The fact remains that there was an alternative -- you could have continued in your position. By doing so the agency would have been in the position of either allowing you to continue in the performance of your position or of taking appropriate adverse action within the meaning of the personnel laws. If the agency chose to take adverse action against you, you would have had the right to appeal. Further, if the agency took action to suspend you as security risk, as you allege was threatened, you could have appealed under the provisions of Public Law 733, 81st Congress.

You elected not to continue in your position and submitted your resignation to the agency. The resignation was a voluntary act on your part and there is no right of appeal from a voluntary act.

Under the circumstances your appeal is denied.

No further appeal from this decision will be entertained unless it is submitted to the Board of Appeals and Review, U.S. Civil Service Commission, Washington 25, D.C., within seven days after receipt of this letter. Please notify this office if you make a further appeal so that we may send the case file to the Board without delay.

Sincerely yours,

/s/ S.L. Elliott,
Chief, Appeals Examining Office

[Enclosure 15, Gov't. Ex. A]

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D.C.

April 26, 1961

Mr. Jeremiah D. Griesemer
6416 Portal Avenue
Temple Hills, Maryland

Dear Mr. Griesemer:

This refers to your letter of March 7, 1961, in support of your further appeal to this Board from the decision of the Appeals Examining Office, issued January 9, 1961, denying your appeal from separation due to voluntary resignation from the position of Scientific Staff Assistant, GS-11, U.S. Naval Research Laboratory effective January 1, 1960.

Your representations have been fully considered and all available information pertinent to your resignation has been examined. Despite your allegations that circumstances were brought about by officials of the Naval Research Laboratory which you regarded as threatening to a degree which compelled you to resign, we must conclude that the decision of the Appeals Examining Office was correct on the facts presented. We take particular note that your resignation was tendered on or about October 9, 1959, and did not become effective until January 1, 1960; yet formal protest to the Commission alleging a forced resignation was not lodged until December 19, 1960, obviously subsequent to unsuccessful efforts to obtain further Federal employment. Also, we are aware of the tenor of various decisions of the Judiciary which you cite, but we do not find in them a basis to persuade a different result in your case.

Accordingly, the decision of the Appeals Examining Office, issued January 9, 1961, is affirmed.

For the Commissioners:

Sincerely yours,

/s/ John E. Blann
Chairman, Board of Appeals and Review

Govt's EXHIBIT NO. B

AFFIDAVIT

I, Harold H. Kay, being duly sworn, depose and say that I am Head of the Employee Relations Branch at the U. S. Naval Research Laboratory, and that I was serving in that capacity in September and October, 1959, at the time when the incident described below occurred.

On 29 September 1959, Mr. Jeremiah D. Griesemer, at that time an employee of the Laboratory, was found to be intoxicated while at the Laboratory upon examination by the Laboratory Medical Officer, Dr. J. B. Vick.

I met with Mr. Griesemer on or about 6 October 1959 and informed him of the fact that his supervisor and the Laboratory viewed the intoxication incident with such seriousness that consideration was being given to preferring charges which might lead to his removal.

I advised Mr. Griesemer fully as to his rights in disciplinary procedures. Mr. Griesemer, himself, expressed the idea of resignation and inquired as to whether or not I thought the charges would be pressed if a resignation were submitted. I informed Mr. Griesemer that the decision as to whether or not charges would be preferred and pressed would be made by his supervisor. Mr. Griesemer left my office stating that he would discuss the matter with his supervisor.

In his recent complaint to the U. S. District Court, Mr. Griesemer alleges that on or about 8 October 1959 he notified me that he would oppose the letter of charges. He further alleges that in the same conversation I told him that if he didn't resign "he could 'forget about' his veterans' preference rights because that would result in immediate suspension as a 'security risk'....". This conversation never took place and I did not talk to Mr. Griesemer after the interview described above (on or about 6 October 1959) until Mr. Griesemer reported over the telephone that he had already resigned. The leave records at this Laboratory indicate that I was on annual leave on the 7th and 8th of October, 1959. The next communication between Mr. Griesemer and

myself was by telephone on 9 October 1959 at which time he told me he had already submitted his resignation. At this time, Mr. Griesemer inquired as to whether security was involved in his case. This was the first time that security was mentioned in our discussions. I informed Mr. Griesemer that decisions of this sort come within the jurisdiction of the Security Screening Board rather than that of the Personnel Division and that I could give him no information regarding this subject.

/s/ Harold H. Kay

State of Ohio)
County of Cayahogo) SS
Sworn to before me this
15 day of November, 1961, at Cleveland, Ohio
/s/ A. Edgar Shroyer, Notary Public
My commission expires Dec. 2, 1961

Govt's EXHIBIT NO. C

AFFIDAVIT

I, Richard L. Dolecek, being duly sworn, depose and say that I am Superintendent of the Solid State Division at the U. S. Naval Research Laboratory. As such I was the supervisor of Mr. Jeremiah D. Griesemer, the plaintiff. Furthermore, I was serving in that capacity in 1959 at the time the incident described below occurred.

On 29 September 1959, Mr. Jeremiah D. Griesemer, at that time an employee of the Laboratory, was found to be intoxicated while at the Laboratory upon examination by the Laboratory Medical Officer, Dr. J. B. Vick.

On 30 September 1959, I met with Mr. Harold H. Kay, Employee Relations Officer, and Mr. John Harms, Personnel Officer, to determine what course of action should be taken with reference to the above incident. In view of the seriousness of what had happened, consideration

was being given to preferring charges which might lead to Mr. Griesemer's removal.

I subsequently met with Mr. Griesemer to discuss with him the seriousness of what had occurred. At no time was there any reference to the possibility that he might be considered a security risk. Furthermore, the plaintiff's allegation in his petition that I concurred in the alleged threats by Mr. Kay that the plaintiff would be considered a security risk is untrue. As a matter of fact, I never discussed the matter of security with reference to the incident reported above. Mr. Griesemer continued to have complete access to classified information until the effective date of his resignation which was more than three months after the intoxication incident.

/s/ Richard L. Dolecek

City of Washington
District of Columbia

City of Washington
District of Columbia ss

Sworn to before me this

14th day of November, 1961.

/s/ Margaret M. Canfield
Notary Public In & For The
District of Columbia
Commission Expires 29 February 1964

22-A

Standard Form 52—Rev. July 1957
Promulgated by the U. S. Civil Service Commission FPM, R-1.

REQUEST FOR PERSONNEL ACTION

TP
12-31-59

PART I. REQUESTING OFFICE: Unless otherwise instructed, fill in all items in this part except those inside the heavy lines. If applicable, obtain resignation and separation data on reverse side

1. NAME (Last—First—Middle—Mr.—Miss—Mrs.)	2. DATE OF BIRTH	3. IDENTIFICATION (Optional)	A. Request Number
GRIESEMER, Jeremiah D.	2/4/20		

B. Kind of Action Requested: (1) Personnel (Specify appointment, reassignment, resignation, etc.)	C. Proposed Effective Date	D. Date of Request
Resignation	1-1-60	10-9-59
(2) Position (Specify establish, review, abolish, etc.)	E. Position Sensitivity	

5. NATURE OF ACTION (Use standard terminology)	6. EFFECTIVE DATE OF ACTION	7. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
Resignation	1-1-60	

FROM—	8. POSITION TITLE AND NUMBER	TO—
Scientific Staff Assistant ✓ (Solid State) P. D. No. ~~1301-110725~~ GS 1301-11, ~~$7465.~~	9. SERIES, GRADE, SALARY	
Solid State Division ✓	10. NAME AND LOCATION OF OFFICE BY WHICH EMPLOYED	
	11. DUTY STATION	
☐ Yes	12. APPORTIONED POSITION	☐ Yes ☐ Appointment Waived ☐ Proved STATE:

F. Remarks by Requesting Office (Continue in item F on reverse side, if necessary. Show, if applicable, any known additional or modified reasons for resignation)

G. Requested by (Signature and title) J. D. Griesemer
J. D. Griesemer, Scientific Staff Asst.

H. For additional information Call (Name and telephone number)
J. D. Griesemer, Ext. 496

I. Request approved by: R. L. Dolecek
Signature R. L. Dolecek
Title: Superintendent, Solid State Division

PART II. TO BE COMPLETED BY PERSONNEL OFFICE (Items inside heavy lines in Part I above also to be completed)

13. VETERAN PREFERENCE				14. TENURE GROUP	15. POSITION TO BE OCCUPIED IS IN THE:
No.	5-pt.	10-pt. Disab.	10-pt. Other		☐ Competitive Service ☐ Excepted Service

16. APPROPRIATION	17. PAYROLL DEDUCTIONS			J. Position Classification Action			
From: To:	CSR	FICA	FEGLI	New	Visa	L. A.	Regr.

K. CLEARANCES	Initials or Signature	Date
(1)		
(2) CEIL. OR POS. CONTROL		
(3) CLASSIFICATION	JDM	12-9-59
(4) PLACEMENT OR EMPL.		
(5) Employee Relations Br. 125	[illegible]	12/24/59
(6) APPROVED BY:		

(7) Remarks: (Note: Use item 19 on reverse for Standard Form 50 remarks)

Qualification Standard:
SF55/JDM. Send 66 per J.M.

Govt's EXHIBIT NO. D

22-B

STANDARD FORM 52
Rev. July 1957

PART III. TO BE COMPLETED BY EMPLOYEE

RESIGNATION (IMPORTANT—NOTE TO EMPLOYEE: Give specific reasons for your resignation. Avoid generalized reasons, such as, "Ill health," personal reason.")

I RESIGN FOR THE FOLLOWING REASONS:

9 October 1959
(DATE RESIGNATION IS WRITTEN)

Incompatability with supervisor.

The effective date of my resignation will be 1 January 1960

Jeremiah D. Gruesemer
(SIGNATURE)

PART IV. SEPARATION DATA

FORWARD COMMUNICATIONS, INCLUDING SALARY CHECKS AND BONDS, TO THE FOLLOWING ADDRESS:

(Street) (City) (Zone) (State)

PART I. (Continued)

F. Remarks by Requesting Office:

OCT 9 1959

PART II. (Continued)

19. STANDARD FORM 50 REMARKS

☐ Subject to completion of 1 year probationary (or trial) period commencing

☐ Service-counting toward career (or permanent) tenure from

☐ Successor position—employee retained in the competitive service.

☐ Entrance performance rating satisfactory

Separations: Show reasons below, as required. Check, if applicable: ☐ During probation ☐ From appointment of 6 months or less

U. S. GOVERNMENT PRINTING OFFICE : 1957 O-F—437563

[Filed December 18, 1961]

OPPOSITION TO MOTION TO DISMISS OR
IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Comes now defendant and moves the Court to deny defendant's Motion to Dismiss or in the Alternative for Summary Judgment and as reason therefor states that there are genuine issues of fact which are material to the granting of the relief sought and that the resolution of these issues in favor of the plaintiff will establish a claim for which relief may be granted.

Attached hereto and made a part of this Opposition are plaintiff's Affidavit identified as Plaintiff's Exhibit 1. and Statement of Material Fact As To Which There Is Genuine Issue.

/s/ Jeremiah D. Griesemer
Plaintiff

[Certificate of Service]

[Filed December 18, 1961]

AFFIDAVIT

(Plaintiff's Exhibit No. 1)

I, Jeremiah D. Griesemer, being duly sworn, depose and say that I am the plaintiff in the above-captioned case, and that

Each and every allegation of fact contained in the Complaint herein is the truth with the following sole possible exception: Although shown in the correct sequence in the Complaint herein, there appears to be error in time amounting to about two days in the allegations of: threat to bring charges of misconduct against plaintiff, election by plaintiff to contest said charges of misconduct, threat to brand plaintiff as a security risk and oral protest to defendant Krepf by plaintiff regarding the security risk threat. I used the words "on or about" in the Complaint because of the possibility of such error.

I have read carefully the affidavits identified as Government's Exhibits B and C herein and sworn to by Harold H. Kay and Richard L. Dolecek respectively.

The Dolecek affidavit is true in stating that consideration was being given to preferring charges, but equivocal in implying that a decision had not been reached. It is also true in stating that he did not discuss the matter of security risk with me or in so many words concur with the Kay threat, but equivocal in implying that he did not know of the Kay threat.

The Kay affidavit is equivocally true in stating "This conversation never took place" if that quote means that there was no conversation between him and me on Oct. 8. The statement on page two of the Kay affidavit "This was the first time that security was mentioned in our discussions." is perjury. Kay did threaten me with a security risk charge in the course of our discussions and he did say that if it became necessary to bring such charges I could forget about my veterans' preference rights, particularly mentioning my right to 30 days' notice.

All of the statements in the foregoing Affidavit are the truth to the best of my knowledge and belief.

/s/ Jeremiah D. Griesemer

[JURAT the 18th day
of December, 1961]

[Filed December 18, 1961]

STATEMENT OF MATERIAL FACT AS TO WHICH THERE IS GENUINE ISSUE

1. The incidents of late September and early October, 1959 referred to heretofore in this case followed over two years of efforts by defendants' employees to obtain the voluntary resignation or transfer of Plaintiff from the U. S. Naval Research Laboratory.

2. Charges of misconduct by plaintiff on September 29, 1959 were unfounded in that at the time of the alleged misconduct plaintiff was in a leave status and not employed on duty and in that the alleged "slight intoxication" was brought about by the consumption by plaintiff of prescribed drugs.

3. Harold H. Kay and Richard L. Dolecek told plaintiff that if plaintiff did not resign, charges of misconduct would be brought against him.

4. Plaintiff elected to accept and contest said misconduct charges.

5. Kay thereupon told plaintiff that if plaintiff refused to resign, he would be charged as a security risk and immediately suspended, thereby losing any veterans' preference rights he might have under charges of misconduct.

6. Plaintiff thereupon executed a written resignation, involuntarily, under duress, and under oral protest personally delivered to Defendant Krapf.

7. As a part of the process alleged above, defendant's employees willfully mis-classified plaintiff and misinformed the Civil Service Commission as to the classification factors related to plaintiff's duties and responsibilities.

/s/ Jeremiah D. Griesemer
Plaintiff

[Filed January 11, 1962]

ORDER

Upon consideration of the motion of defendants to dismiss or in the alternative for Summary Judgment filed herein Nov. 17, 1961, it is this 11th day of January, 1962

ORDERED that the motion be,and the same hereby is, denied.

by direction of
Edward M. Curran
Judge

HARRY M. HULL, Clerk
/s/ by Daniel J. Mencoboni
Deputy Clerk

[Filed January 22, 1962]

ANSWER

Comes now the United States Attorney for the District of Columbia in behalf of defendants and in answer to the complaint informs this Honorable Court as follows:

First Defense

The Court lacks jurisdiction over the subject matter of the complaint.

Second Defense

The complaint fails to state a claim for which relief may be granted.

Third Defense

Plaintiff resigned voluntarily, thus his separation from Federal service was not caused by defendants herein.

Fourth Defense

Specifically answering the numbered paragraphs of the complaint, defendants aver:

1. Defendants are not required to answer the allegations of jurisdiction in paragraph 1 of the complaint.

2. Defendants admit the allegations of paragraph 2 of the complaint.

3. Defendants admit that on October 6, 1959 Harold Kay advised plaintiff fully as to his rights under the Veterans Preference Act of 1944 and gave plaintiff adequate time for consideration. Defendants deny the remaining allegations of paragraph 3 of the complaint.

4. Defendants deny the allegations of paragraph 4 of the complaint.

5. Defendants admit that plaintiff filed a classification appeal on September 17, 1959 which was denied on March 17, 1960; admit that N.R.L. told the Commission that Plaintiff's proper classification should be Administrative Services Officer GS-11; and deny the remaining allegations of paragraph 5 of the complaint.

6. Defendants deny the allegations in paragraph 6 of the complaint.

7. Defendants admit that plaintiff resigned on October 9, 1959, effective January 1, 1960, and deny the remaining allegations of paragraph 7 of the complaint.

8. Defendants admit that plaintiff had security clearance and that such clearance was never revoked. Defendants deny the remaining allegations of paragraph 8 of the complaint.

9. Defendants are without sufficient knowledge or information to form a belief as to the allegations of paragraph 9 of the complaint and therefore deny them.

10. Defendants admit the allegations of paragraph 10 of the complaint.

/s/ David C. Acheson
United States Attorney

[Filed February 20, 1962]

INTERROGATORIES

To: Jeremiah D. Griesemer
6416 Portal Ave.
Temple Hills, Maryland

The following interrogatories are addressed to you by the defendant, United States of America, pursuant to Rule 33, Federal Rules of Civil Procedure. You are required to answer these interrogatories separately and fully in writing, under oath, and to serve a copy of your answer on the United States Attorney for the District of Columbia, attorney for said defendant, within fifteen (15) days after the interrogatories are served upon you:

1. Please state your full name, date of birth, residence and occupation.

2. Please give all the addresses, with dates, at which you resided

for the five years immediately prior to the date on which you filed the complaint in this cause.

3. Have you ever been plaintiff or defendant in a civil suit? If so, please give the name of the case and action number thereof as well as the date.

4. Have you ever been convicted of a crime. If so, please state the date, and place of conviction.

5. List the names, addresses, official titles, if any, and other identification of all witnesses who it is contemplated will be called on to testify in support of your claim in this action, indicate the nature and substance of the testimony which it is expected will be given by each such witness.

6. List, identify and describe the contents of each document which it is contemplated will be offered in support of your claim in this action.

7. Have disciplinary proceedings ever been started against you by the Bar of any court of which you are a member? If so describe such proceedings.

8. List any other names you have ever been known by, the period of time during which you were so known and the place you were so known.

9. State whether or not you knew the procedure whereby individuals may be removed because they are security risks from positions at the Navy Research Laboratory on September 29, 1959.

10. Set forth in detail what was said by you and what was said by Captain Krapf in the interview you had with him on or about October 7, 1959.

11. Describe in detail the actions and the date of such action taken by each individual involved which you claim were improper or illegal in connection with your classification as an Administrative Assistant, GS-11.

12. Have you ever been intoxicated while on the premises of the Naval Research Laboratory?

13. Set forth in detail what you said and what Mr. Kay said in the conversation you had with him on or about October 6, 1959.

14. List the individuals whom you claim made threats of charging you with being a security risk and the date such threats were made.

15. Set forth in detail what you said and what was said to you by each of the individuals listed in answer to interrogatory 14 on the dates listed.

/s/ Byron K. Welch
Assistant United States Attorney

[Certificate of Service]

[Filed February 21, 1962]

ANSWERS TO DEFENDANTS' INTERROGATORIES

There follow in the order asked the answers of plaintiff, Jeremiah D. Griesemer, to the Interrogatories filed herein on February 20, 1962 by defendant identified in said Interrogatories as "United States of America";

1. Jeremiah Deuel Griesemer; February 4, 1920; 6416 Portal Avenue, Temple Hills, Maryland; Scientific Staff Assistant and Attorney.

2. 6416 Portal Ave., Temple Hills, Md., June 13, 1956 to date.

3. Yes. Hulvey v. Friend, Griesemer, et al, U. S. Dist. Ct. No. unknown, circa Spring, 1950; Griesemer v. Group Hosp. Ins. Co., Small Claims, D.C., No. C19044-52, 11/26/52; Hecht Co. v. Griesemer, Small Claims, D. C. No. C10501-53, 6/12/63; Griesemer v. Lawyers Title Ins. Co. of Richmond, Mun. Ct. D. C. No. M-11977-59, 6/9/59; Griesemer v. Copeland, et al, Ckt. Ct. for Prince Georges County Md. Law No. 12194, June, 1959; NRL Fed. Credit Union v. Griesemer, Trial Magistrate's Court, Hyattsville, Md. No. unknown, 1960? Shylock v. Griesemer, Mun. Ct, D. C. No. unknown, 1960?

4. No. This answer ignores petty traffic violation forfeitures.

5. Not yet decided, but will probably be limited to:

Plaintiff to describe facts surrounding wrongful classification and resignation-under-duress.

R. L. Dolecek, Superintendent, Solid State Division, NRL to describe his part in the above.

Kenneth Harper, Classification Officer, NRL to describe classification factors and evaluation of plaintiff's position classification.

The substance of the foregoing witnesses' testimony will support the allegations set forth in the complaint herein in detail.

6. At present plaintiff does not contemplate the introduction of any documents other than those already furnished by counsel for defendants.

7. No.

8. "Jerry". My lifetime, everywhere.

9. Yes.

10. I told Capt. Krapf that I had been ordered by my supervisor and the Employee Relations Officer to resign immediately; I told him that my supervisor had told me that this was a decision made by "the administration" and that he could not approve a delay until the first of the year without approval by "the administration". I told him that I considered their demand harsh and unfair and that I resented their use of a security risk threat to force me to resign. I asked him to reverse the decision to require my resignation. Capt. Krapf told me that he was not familiar with the circumstances and that he knew nothing about any threats and that he would look into the matter. He said that the decision requiring my resignation was solely up to Dr. Dolecek, my supervisor, and that he, Capt. Krapf, would have to rely upon the judgment of such a subordinate official and would not reverse him. He said that if there were any question of his approving an effective date of my resignation, he would approve an effective date of 1 January, provided there was no objection by my supervisor or the personnel office.

11. I have never been classified as "an Administrative Assistant,

GS-11. From 1954 through 1959, on each occasion when the Personnel Division and Classification Officer were notified by plaintiff and his supervisor in writing on the Annual Position Description Maintenance Report that my classification was erroneous, their failure to act to correct the classification was improper and illegal and in violation of Naval Civilian Personnel Instructions and the Classification Act of 1949 as amended. Information furnished to Asa McCain of the Civil Service Commission for use in determination of my Classification Appeal which information was given informally and by letter dated 12/31/59 and was furnished by my supervisor and the Classification Officer was inaccurate and deliberately misleading and therefore improper and illegal.

12. On or about September 29, 1959, as the result of stomach disorder, the ingestion of an overdose of prozine and aspirin, and the ingestion of one drink with chaser, I was, slightly intoxicated.

13. Mr. Kay said he guessed I knew what he had called me in for and I said I did and he said he was very sorry. He said he assumed I knew the routine but he would have to give it to me anyway because he was required to by regulation. Whereupon he outlined my rights under the Veterans' Preference Act to a list of charges in writing, 30 days to answer in writing, and a hearing represented by anyone of my own choosing. He said that penalties had recently been changed to provide for outright dismissal on a finding of intoxication on duty. I asked him if he had the list of charges in writing he mentioned, and if I could read it; he said that it had not been formally prepared and that they don't like to put charges in a man's jacket unless it is necessary, but that such a list could be prepared readily enough for me. I told him that I didn't think that the charges could be sustained -- that for one thing, I was not even in a duty status but was on leave on the day in question. I told him I thought I would contest the case. Mr. Kay said that if I would resign nothing would appear in my personnel jacket and I could make the effective date within reason and not immediately but that I would have to

sign the resignation promptly. He said that if I insisted on fighting the case, there was another way they could handle the matter under what he called a new law -- he named Public Law 733. He said that under that law a sensitive agency like NRL could suspend a security risk on the spot. He said that intoxication was grounds for calling a man a security risk; he pointed out that there were claims of indebtedness against me and that such claims were grounds for a charge of security risk. He said that they would hate like hell to do it to me but if I persisted, I could forget about the 30 days' notice and other Veterans' Preference rights. He said that NRL could bring security risk charges against me "now or at any time". He said that he was begging me to resign instead and he gave me a couple of days to think it over.

14. Harold H. Kay directly on or about October 7, 1959; Richard L. Dolecek indirectly on or about October 7 or 8, 1959.

15. See answer 13 above as to Kay. In a subsequent conversation with Dr. Dolecek in which the latter tried to persuade me to resign quietly I told him I thought I should contest the action. Dr. Dolecek said, "Oh, Jerry! You don't want the embarrassment of all of those investigations!" He did not refer directly to bringing security risk charges or even use the words "security risk". But I had known him almost intimately for many years and I knew from the acute uneasiness he showed upon saying this that either Mr. Kay or Mr. Harmes had told him of the threatened security risk charge.

State of Maryland)
County of Prince Georges) ss:

Jeremiah D. Griesemer, being first duly sworn, deposes and says that the foregoing and attached Answers to Defendants' Interrogatories are true to the best of his knowledge and belief.

/s/ Jeremiah D. Griesemer

[JURAT the 20th day of February, 1962]

[Certificate of Service]

[Filed September 3, 1963]

TRANSCRIPT OF PROCEEDINGS

The above-entitled cause came on to be heard before Hon. Leonard P. Walsh, Judge, at 10 o'clock A.M. February 12, 1963.

APPEARANCES:

For the Plaintiff: Mr. Jeremiah D. Griesemer, Esq.

For the Defendants: Mr. Daniel J. McTague, Asst. U. S. Attorney.

RULING OF THE COURT

The Court: The Court, having heard the testimony in the case and having heard argument of counsel of the proponent and the opposition to the Motion filed by the defendants, and being cognizant of the suggestion from the Court of Appeals that the Trial Judge should be reluctant to grant motions and to proceed, as it were, to the termination of the case, so that in the event of a review the entire record will be before it, however, in this case the Court is of the opinion that the evidence is clear that the main question in the case is whether or not the resignation submitted by the plaintiff in this action to the Governmental Agency was made voluntarily, that is, without coercion or duress.

The Court has had the opportunity of hearing the opening statement of counsel, I mean of the plaintiff, and of hearing the testimony. The Court further recognizes that the testimony of Doctor , who was the Supervisor is not consistent with the testimony of the plaintiff, even to the extent where the plaintiff has announced surprise.

The Court is of the opinion that the plaintiff in this action is an intelligent, experienced individual, and especially experienced in his particular work at the Naval Laboratory, to the extent where the Supervisor, himself, through the years, became dependent to a great extent, so far as administrative matters were concerned, on the plaintiff; that the plaintiff in this action certainly is not easily susceptible to any coercion or any duress by any executive personnel or employee.

The Court is of the opinion that the motion of the plaintiff in the case should and, therefore, is granted, and the defendant in the case will submit specific findings of fact in accord with the record which has been made in this case.

Mr. McTague: Your Honor, you said the motion of the "Plaintiff".

The Court: The motion of the defendant.

Mr. McTague: Thank you, Your Honor.

(Whereupon, at 12:30 p.m. the instant matter was concluded.)

[Filed September 6, 1963]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before the Court on February 7, 8, 11 and 12, 1963; and on February 12, 1963, the motion of defendants to dismiss and enter judgment for defendants was argued and granted, and counsel for defendants was directed to prepare and submit findings of fact and conclusions of law. Said findings and conclusions were submitted on June 28, 1963. The Court has reviewed the record in the case and now makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff, Jeremiah D. Griesemer, was a federal Civil Service employee with Veterans' Preference, employed by the Naval Research Laboratory, Washington, D. C., in 1954 in a position which was then classified as Scientific Staff Assistant, GS-11.

2. On April 12, 1954 plaintiff was admitted to the Bar of the United States District Court for the District of Columbia.

3. In January 1954 plaintiff was recommended for promotion to Scientific Staff Assistant, GS-12, but the division in which plaintiff was

then employed was reorganized and became the "solid state division" of the Naval Research Laboratory during 1954.

4. In December 1957, pursuant to the requirements for promotion, plaintiff prepared a position description.

5. In June 1959 plaintiff made his position description current. On September 17, 1959 plaintiff appealed to the Civil Service Commission the failure of his agency to act upon his request that his position be classified as GS-12.

6. Towards the end of December 1959 plaintiff was notified by the Classification Office of the Naval Research Laboratory that his position was properly classified as GS-11 and not GS-12.

7. On March 17, 1960, the Classification Appeals Examining Office of the Civil Service Commission reached the decision that plaintiff had been properly classified as GS-11 rather than GS-12. Plaintiff did not appeal this decision to the Commission's Board of Appeals and Review.

8. On September 29, 1959, there occurred an incident in which plaintiff was involved, and which resulted in plaintiff's separation from his employment with the Naval Research Laboratory and ultimately in this suit.

9. On Monday, September 28, 1959 plaintiff had reported in as sick.

10. On September 29, 1959 plaintiff had made no report and had not appeared at the Laboratory until, sometime after Noon, he appeared at the Laboratory with some papers which he desired to have typed by the secretaries at the Laboratory. He was considered by the authorities at the Naval Research Laboratory to be unable to perform his duties because he was under the influence of an excessive ingestion of alcohol.

11. On or about October 6, 1959 plaintiff had a conversation with Harold Kay, employee relations officer of the Naval Research Laboratory, concerning the incident of September 29. Mr. Kay conveyed to

plaintiff the idea that the administration of the Naval Research Laboratory considered the incident to be serious and that disciplinary measures were to be taken against plaintiff.

12. Plaintiff maintains that he was, at that point, willing to contest any charges about misconduct arising from the incident of September 29th and that he so expressed himself to Mr. Kay; and according to plaintiff, Mr. Kay then stated that the Naval Research Laboratory could bring security charges against plaintiff then, or at any time, and that if plaintiff wished to contest the misconduct charges, security charges would be brought against him, and, again, could be brought against him "at any time". In this state of affairs, again, according to plaintiff's own contentions, Mr. Kay gave plaintiff sufficient time to consider his course of action, i.e., whether to resign or to contest any proposed disciplinary action against him.

13. The time allowed was at least to October 9, 1959.

14. On October 9, 1959 plaintiff submitted in writing his resignation giving as the reason therefor "incompatibility with (his) supervisor".

15. Plaintiff's resignation, at his own request and as approved by the commanding officer of the Naval Research Laboratory, was effective as of January 1, 1960.

16. As of January 1, 1960 plaintiff was separated from his employment with the Naval Research Laboratory and all Civil Service employment.

17. On December 19, 1960 plaintiff filed an appeal with the Civil Service Commission from the action taken by the Naval Research Laboratory in processing plaintiff's resignation and removing him from his position. The Board of Appeals and Review of the Civil Service Commission affirmed the decision that plaintiff's resignation had been voluntary and that therefore there was no adverse action of the employing agency (the Naval Research Laboratory) from which an appeal would lie. On June 26, 1961, plaintiff filed the instant action in which he

complained: (1) that he should have been a grade higher than he actually was, i.e., grade GS-12 rather than GS-11; and (2) that his resignation was coerced and was therefore ineffective to separate him from federal service.

18. Plaintiff at the time of his separation from the federal service was an attorney, a member of the bar of this court, and was familiar with classification and appeal procedures of the Civil Service Commission by reason of his position, which required him to adjust and advise Civil Service employees of his section of the Naval Research Laboratory on classification and other personnel matters.

19. From all of the foregoing the Court concludes as a matter of fact that plaintiff's resignation was not coerced or involuntary.

Conclusions of Law

1. The evidence in this case, as well as the administrative records, amply support the findings of the Naval Research Laboratory as well as the Civil Service Commission that plaintiff voluntarily resigned and was not coerced into submitting his resignation.

2. Plaintiff's resignation from the federal service, being voluntary, was effective for all legal purposes.

3. Plaintiff was guilty of laches in failing to appeal to the Civil Service Commission his alleged coerced resignation until more than 14 months after the alleged coercion had occurred.

4. The administrative records filed in this action amply support the conclusion of the Naval Research Laboratory and of the Civil Service Commission that plaintiff was properly classified as a GS-11 employee.

5. Plaintiff failed to exhaust the administrative remedies which might have been available to him in regard to alleged impropriety of his classification.

6. Since plaintiff's resignation was voluntary, the issue of whether he should have been a GS-11 or GS-12 employee is moot.

7. Defendants are entitled to judgment in their favor.

September 6, 1963 /s/ Leonard P. Walsh, Judge

[Filed September 6, 1963]

ORDER

This cause having come on for trial by the Court and the Court having heard plaintiff's evidence and considered the stipulations of the parties, and having made findings of fact and conclusions of law, it is by the Court this sixth day of September, 1963,

ORDERED, that judgment be entered in favor of defendants.

/s/ Leonard P. Walsh, Judge

[Filed November 5, 1963]

NOTICE OF APPEAL

Notice is hereby given this fifth day of November, 1963, that plaintiff, Jeremiah D. Griesemer, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the sixth day of September, 1963 in favor of defendants against said plaintiff.

/s/ Jeremiah D. Griesemer
Plaintiff, Pro Se
6416 Portal Ave., S.E.
Washington, D. C.

The Clerk of the Court will please mail copies to David C. Acheson and Daniel J. McTague, Attorneys for Defendants, Office of the United States Attorney, U. S. Courthouse, Washington, D. C.

/s/ Jeremiah D. Griesemer

[Filed January 27, 1964]

STATEMENT OF POINTS ON APPEAL

The Court erred as follows:

1. In granting defendants' Motion To Dismiss and entering judgment for defendants.

2. In basing said judgment wholely or in part upon LACHES, or in being influenced by said Laches, where Laches had not been pleaded by defendants.

3. In holding that the victim of duress, simply because of his legal training and understanding of the nature of duress and alleged "intelligence", could not have yielded to such duress.

4. In reversing the prior determination of the Court that the case not be dismissed, a prima faci case having been made out upon submission of pleadings and affidavits of the parties.

/s/ Jeremiah D. Griesemer, Plaintiff

[Certificate of Service]

[Filed January 27, 1964 and included in the Record transmitted to this Court; ordered striken from the Record in the Court below on February 1964; included in Appellant's Statement of Contents of Joint Appendix on February 6, 1964, without objection in Appellee's Counter-designation of Record To Be Printed In Joint Appendix filed in this Court on February 18, 1964]

STATEMENT OF PROCEEDINGS AND EVIDENCE

This cause came on to be heard on February 7, 1963 before Judge Leonard P. Walsh and after an opening statement of plaintiff in which it was alleged that he would show that he was involuntarily forced to resign from his position at the Naval Research Laboratory first by threat that if he refused to so resign he would be charged with misconduct,

there being no grounds for such charges, and second, that if he refused to so resign, he would be suspended as a security risk, there again being no grounds for such charge.

WHEREUPON, plaintiff called as his first witness plaintiff Jeremiah D. Griesemer, who testifying on matters related to this appeal stated substantially as follows:

That he was employed at the Naval Research Laboratory in 1949 as a veteran preference eligible; that after promotion to Scientific Staff Assistant GS-11, in the Solid State Division in June, 1957 he submitted a position description at the request of his supervisor, Dr. Richard Dolecek, for promotion to GS-12; that beginning in the fall of 1957, his supervisor discouraged his continuance as an employee at NRL.

That on or about October 6, 1959 the Employee Relations Officer, Harold Kay, threatened to charge him with misconduct in being drunk on duty on September 29, 1959 unless he should resign, giving him ample time to think the matter over; that plaintiff told Mr. Kay that he probably would contest such charges on grounds that he was neither drunk nor on duty on the date alleged. That thereupon the said Kay did immediately threaten that if plaintiff did contest the said charges, then he would be suspended as a "security risk".

That in subsequent discussions with his supervisor, Dr. Richard L. Dolecek, plaintiff got the clear impression that the said Dolecek knew of and joined the said Kay threats, saying, oh, Jerry, you don't want the embarrassment of all those investigations".

That Kay had threatened that he could bring the "security risk" charges at any time. That upon careful consideration of the consequences to himself and his family of a security risk suspension, and disregarding the likelihood that he could defeat the misconduct charges, plaintiff reluctantly decided to comply with the demand that he resign, and did so.

UPON CROSS-EXAMINATION, plaintiff stated that he had been a member of the bar of this Court since 1954, that he was somewhat ex-

perienced in civil service dismissal procedures and generally knew of security risk suspension procedures, but that he had never had any case experience either in dismissals or in security risk cases.

WHEREUPON, plaintiff called his supervisor, Dr. Richard L. Dolecek, who testified substantially as follows:

That he knew of the discussions between Kay and the plaintiff, but that he had no personal knowledge of any threats to plaintiff by Kay. That he did not himself make any threats to plaintiff. That he had no reason whatsoever to consider plaintiff a security risk and that he had treated plaintiff as a good security risk from September 29, 1959 to January 1, 1960.

Plaintiff called two other witnesses whose testimony has no bearing upon this appeal.

/s/ Jeremiah D. Griesemer
Plaintiff
6416 Portal Ave.
Temple Hills, Md.

[Certificate of Service]

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18373

JERIMIAH D. GRIESEMER, APPELLANT

v.

BRADLEY F. BENNETT, Captain, United States Navy, et al
APPELLEES

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

C. A. 2079-61

QUESTIONS PRESENTED

1. In a case involving an alleged coerced resignation from employment with the Federal Government, did the trial judge, sitting without a jury, have grounds for holding that appellant's resignation was not the result of coercion?

2. In a case in which a motion for summary judgment has been denied by one judge, was it proper for the trial judge, sitting without a jury, to hold at the end of the plaintiff's case that the resignation in issue was not coerced?

3. Whether, after hearing appellant's explanation of why he had delayed 14 months before asserting that he had been coerced into resigning because of a wrongful threat of security charges, the trial court properly held that appellant was guilty of *laches*, even though appellees had not pleaded this defense?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,373
(C.A. No. 2079-61)

JEREMIAH D. GRIESEMER, APPELLANT

v.

BRADLEY F. BENNETT, Captain, United States Navy, et al.
APPELLEES

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

On June 6, 1961, appellant filed the complaint in this case alleging (1) that on or about October 6, 1959, the Employee Relations Officer at the Naval Research Laboratory threatened appellant with a false security risk charge unless appellant resigned and that under this duress appellant did resign three days later, and (2) that appellant was improperly classified as a GS-11 rather than a G-12

for some time prior to his resignation and that appellees had wrongfully failed to change his classification.

The following facts are undisputed:

Appellant was employed by the Naval Research Laboratory in January 1949, in the competitive civil service and was entitled to the benefits of the Veterans Preference Act of 1944, as amended; In May 1950, he was promoted to Scientific Staff Assistant, GS-7 in the Electricity Division; in October 1950, promoted to Scientific Staff Assistant, GS-9; and in October 1951, to Scientific Staff Assistant, GS-11. The division was reorganized to the new Solid State Division in 1956. In the fall of 1957 he was appointed Navy Department representative in the Civil Service Management Interne Program, from which he was withdrawn in October 1957. In December 1957, appellant prepared a position description pursuant to the requirements for promotion. In June 1959, he brought the position description current and submitted it with his supervisor's certification; on September 17, 1959 he appealed his agency's failure to act upon it to the Civil Service Commission.

On September 29, 1959, a medical officer at the N.R.L. found that appellant was intoxicated to the extent that it would interfere with his usual duties. On or about October 6, 1959, appellant was informed by Richard L. Dolecek, appellant's supervisor, and Harold H. Kay, Employee Relations Officer, that the intoxication incident was viewed with great seriousness and it was contemplated that charges of misconduct would be placed against appellant which might lead to his discharge. On October 9, 1959 appellant submitted a written resignation giving as a reason for resigning "incompatibility with supervisor." The resignation was accepted by appellant's supervisor and it was to become effective January 1, 1961. On March 17, 1960 appellant's classification appeal was denied by the Civil Service Commission which found that appellant had been correctly classified.

On December 19, 1960 an appeal was filed with the Civil Service Commission from the action taken by the Naval Research Laboratory in processing appellant's resignation and removing him from his position. The Civil Service Board of Appeals and Review affirmed the decission that appellant's resignation had been voluntary and that, therefore, there was no adverse action of the employing agency from which an appeal would lie.

In dispute are the facts surrounding the October 8, 1959 conversation between appellant and Mr. Kay. This conversation was about the intoxication incident of September 29, 1959. On Monday, September 28, appellant had telephoned his office and said that he was sick. On the following afternoon he appeared in the office with some personal legal papers which he wanted typed. The chief security guard appeared and took him to the base medical officer who found he was intoxicated to the extent that it would interfere with the performance of his usual duties. Appellant, who is an attorney, was his own counsel and chief witness at the trial of this case. He testified that on the 28th he had suffered from insomnia and had a nervous and upset stomach. On the 29th he was still sick. On three occasions that morning he took a tranquilizer and some aspirin. At lunch he took a drink of whisky and a beer to settle his stomach. Then he went to the Laboratory. (Tr. 2/7/63 at 24-27, 37-45.)

At the October 8 conference between him and Mr. Kay, Mr. Kay told him that the officials of the Laboratory had decided to make a formal charge of misconduct against him. According to appellant's testimony, when appellant stated that he was considering fighting the misconduct charge, Mr. Kay said that he would bring a charge that appellant was a security risk unless he resigned. He also read to appellant his right to a hearing and review under the Veterans Preference Act, all of which appellant was familiar with. (Tr. "Excerpts" II, 2/7/63, at 1-11.) Mr. Kay said that appellant had a few days to think it over. Appellant testified, "It seems to me that it was three days

before I gave a decision, and that would appear to me a reasonable time." (Tr. 2/8/63 at 19.) Appellant also said: "He did not press me. 'Sign now or we will lower the boom.' I was not cornered." (*Id.* at 28.)

Dr. Dolocek, appellant's immediate supervisor at the Laboratory, called as a witness by appellant, testified that it was his understanding that the idea of resigning rather than face charges originated with appellant. He also said that, in a conversation with appellant shortly after appellant's conversation with Kay, when appellant was considering what to do, the subject of possible security charges was never mentioned; in fact, the word "security" was not even mentioned. In the course of a discussion which Dolocek had with Kay about the matter, the word "security" was not mentioned. Tr. 2/8/63, at 77-94. When appellant submitted his resignation on October 9, 1959, he gave as the reason therefor, "incompatibility with supervisor." At his request, his resignation did not become effective till January 1, 1960. During this three-month period he had access to all security information which he had in the prior period.

Appellant testified that, although he was familiar with his right to a hearing and review of any security charge which might be placed against him and was confident that he would be successful in contesting any such charge, he did not want to resort to this procedure because it might be protracted and he did not think that a cloud of doubt would be lifted from his name even if he was eventually vindicated. Instead, he said, he waited until a week or two after he was reasonably sure that the Laboratory had been contacted by Diamond Fuse, an Army Ordnance installation with which appellant had filed an application for employment, and that the Laboratory had said that it had no derogatory information about appellant as a security risk. Then, he said, he felt that the Laboratory, having committed itself as to his security, would not later say that he was a security risk. This happened about 14 months after the alleged threat to bring security charges against him. Tr. 2/7/63 at 29-31. Plaintiff then, in an

appeal filed with the Civil Service Commission, for the first time alleged that this threat had been made.

Plaintiff was admitted to the bar of our District Court on April 12, 1954 and had taken a year of graduate work in law. It was stipulated that in 1959 he was a lawyer of some experience. In his work at the Laboratory he did not handle legal matters but did advise subordinates on some appeal matters. He had about 130 persons under his supervision.

At the trial, which was spread over four days, appellant testified as to the alleged threat and the classification matter. Dr. Dolocek testified on the same subjects. He had not seen appellant on the day of the intoxication incident and he had heard no mention of any possible security charge against appellant or threat of such charge. He said that he did not consider appellant to be a security risk. Two other witnesses testified about matters concerning classification. Their testimony, by agreement of the parties, has not been transcribed.

Appellant does not assign as error the District Court's ruling on the classification issue nor does he treat this point in his brief filed in this Court on August 12, 1964. Appellees consider, therefore, that appellant has abandoned this issue on appeal.

On February 12, 1963, the fourth day of trial, the District Court granted the Government's motion for judgment in its favor made at the close of plaintiff-appellant's case. On September 6, 1963, the Court filed its Findings of Fact and Conclusions of Law in which it found as a matter of fact that appellant's resignation was "not coerced or involuntary." It concluded (1) that "the evidence in this case, as well as the administrative records, amply support the findings of the Naval Research Laboratory as well as the Civil Service Commission that [appellant] voluntarily resigned and was not coerced into submitting his resignation," (2) that appellant's "resignation from the federal service, being voluntary, was effective for all legal purposes, and (3) that appellant "was guilty

of *laches* in failing to appeal to the Civil Service Commission his alleged coerced resignation until more than 14 months after the alleged coercion had occurred." (J.A. 37.)

SUMMARY OF ARGUMENT

I

The trial judge, sitting without a jury, properly found that appellant's resignation was not coerced. After observing appellant's conduct and demeanor during the trial as principal witness and his own attorney, the trial judge observed that appellant "certainly is not easily susceptible to any coercion or any duress by any executive personnel or employee." Appellant was an attorney and had some experience as a lawyer, was familiar with his right to a hearing on security charges and to review of any adverse result, and testified that he was given adequate time to make his decision. Thus, whether the judge's finding was based on disbelief that the alleged threat had been made or on a belief that, if the threat was made, appellant's education, experience and personality well equipped him to handle the situation adequately, he had ample grounds for the finding.

II

Appellant contends that the trial judge could not properly grant judgment for appellees at the end of appellant's case because another judge had denied appellees' earlier motion for summary judgment and appellant had made "a prime facie case" at trial. This argument ignores the function of a judge sitting without a jury to determine whether the events on which a plaintiff's claim is based actually took place and, if they did, whether in view of all the facts established they constitute a cause of action. If either determination is adverse to the plaintiff, the trial judge should enter judgment for defendant when plaintiff has finished presenting all of his evidence.

III

Appellant states that the trial judge should not have found that appellant was guilty of *laches* since appellees had not raised this defense. The law is, however, that the judge may take note of such an affirmative defense where it is established by plaintiff's proof. In this case appellant testified that he deliberately refrained from objecting to the alleged threat for his own purposes and did not raise the objection until fourteen months after the threat had allegedly occurred.

ARGUMENT

I. The trial court properly found that appellant's resignation was not coerced.

The "Statement of the Case" in appellant's brief is one line more than two pages long (Brief at 2-4). As far as it goes it is accurate, with the caution that the first two paragraphs on page 3 of the brief state merely as appellant says, what he "maintained" in the District Court, not what he proved. Appellant enumerates three points on appeal in his "Statement of Points" (Brief at 4). They are (in a different order than appellant presents them): (1) that the District Court should not have found that the plaintiff was "immune to coercion or duress simply because the Court found that he was an attorney or that he was intelligent or that he was experienced" but should have concluded that such a person is "more susceptible" to the threats of wrongful acts, (2) since another judge of the District Court had earlier in the proceedings denied appellee's Motion to Dismiss or for Summary Judgment "with the case in substantially the same posture," the judge at the trial (without jury) "should not have granted [appellees'] motion to dismiss and entered judgment for [appellees] without the presentation of evidence to contradict [appellant's] prima facie case," and (3) the District Court "should not have based its judgment either wholely [*sic*] or partially upon *laches* where that affirma-

tive defense had never been set forth by the [appellants] in their pleadings." (Brief at 4.)

The record in this case, gives no support to the assumptions in appellant's first point as enumerated above [1] that the trial judge (1) "concluded simply because [he] found that [appellant] was an attorney or that he was intelligent or that he was experienced" he was "immune to coercion." (Brief at 4.) The trial judge did not find that appellant was immune to coercion; he found as a fact that appellant's resignation of October 9, 1959, "was not coerced or involuntary," and that appellant "voluntarily resigned and was not coerced into submitting his resignation." (J.A. 37.) No doubt the fact that appellant was an attorney and was "familiar with classification and appeal procedures of the Civil Service Commission by reason of his position" (J.A. 37) influenced the trial judge in his determination that appellant's resignation was not coerced. These were factors bearing on whether appellant knew of his rights in case he elected to face misconduct charges as a result of the intoxication incident and that the submission of a resignation would allow him no opportunity to contest the charges of misconduct on that date or to appeal an adverse decision. They also bear on whether appellant, assuming *arguendo* that the Employee Relations Officer did threaten that security risk charges could be brought against appellant "at any time" and presumably would be if he did not resign, knew of his rights in the face of a security charge and that the submission of a resignation would allow him no opportunity to face such a charge or to appeal from an adverse ruling. In other words, the fact that appellant was an attorney and experienced in personnel matters was a proper factor in determining whether appellant made his decision knowing of his right to contest both a misconduct charge or a security risk charge and to appeal any adverse decision and knowing that if he submitted a resignation he could not exercise these rights—again assuming that the threat of a security

[1] Point Number 3 in appellant's brief at page 4.

risk charge was made. Furthermore appellant's legal education and personnel experience were proper matters to consider in determining whether the Employee Relations Officer did or would make the statement to appellant that security risk charges could be made against appellant "at any time," meaning thereby to include an indefinite time after appellant resigned, and whether, if such a statement were made, appellant believed it to be true and this belief influenced his decision to resign. Appellant's legal education and personnel experience were also factors in judging the credibility of his assertion that such statements and threats were made with coercive effect upon him when they are considered in light of the fact that appellant did not make this assertion until 14 months after the threats were allegedly made and in light of the fact that appellant's request that his resignation be effective three months from the date of its submission was honored and appellant, during these three months performed his regular duties and his security clearance was not lifted by appellees.

The trial judge's finding was evidently based not only upon consideration of appellant's legal education and experience but also upon other matters in the record. These matters include appellant's concession, as it is put in the "Statement of the Case" in his Brief at page 3, that the Employee Relations Officer "offered him adequate time to consider" whether to face disciplinary action on a charge of misconduct or to resign and at a later date "gave appellant sufficient time to consider . . . whether to resign or to contest misconduct charges and security risk suspension;" (2) the fact that even though the Naval Research Laboratory allowed appellant to continue in his position without lifting his security clearance for three months following the submission of his resignation and the alleged threats of bringing a security charge against him, appellant complained to no one about the alleged threats for eleven months after the effective date of his separation when all reasonable prospect of a security risk suspension or preferring of security risk charges had ended, and (3)

the trial judge's own observation of appellant during the trial spread over four days in which appellant was his own attorney and his own chief witness. These considerations led the trial judge to note that appellant "certainly is not easily susceptible to any coercion or any duress by any executive personnel or employee." (J.A. 33.)

II. The trial court properly entered judgment for appellees at the close of appellant's case.

Appellant's second point on appeal[2] as enumerated above needs little more than to be stated to demonstrate that it is devoid of merit. He says, "the Court should not have granted defendants' motion to dismiss and entered judgment for defendants without presentation of evidence by defendants to contradict plaintiff's *prima facie* case, where the lower Court had already denied a similar Motion to Dismiss or for Summary Judgment with the case in substantially the same posture." (Brief at 4.) This statement ignores the different functions of a District Court judge when he hears a motion for summary judgment and when he sits as trier of fact at a trial without jury. In the former instance his role is to determine if there is a genuine dispute as to a material fact; if there is such a dispute, his duty is to deny the motion so that factual issues can be resolved at a trial by a jury or by a judge sitting without a jury. When a judge sits at a trial without a jury, it is his function at the end of the plaintiff's case to determine whether the plaintiff has carried his burden of presenting sufficient evidence to establish in the mind of him, the trier of fact, that the facts necessary to constitute a claim for relief actually took place or, at least, a probability that they actually did occur. If the plaintiff fails to present any evidence to establish a material fact, the court properly enters judgment for defendant at the end of plaintiff's case. The result is the same if the plaintiff introduces evidence in order to establish a material fact but that evidence is not

[2] Point Number 1 in appellant's brief at page 4.

believed by the trier of fact; it is in effect as though the plaintiff had introduced no evidence to establish the fact. In such a case it is proper for the judge to enter judgment for the defendant. A judge sitting without a jury at trial is certainly not bound to believe the plaintiff's evidence.

III. The trial court properly found that appellant was guilty of laches.

In his third point on appeal as enumerated above appellant states that "the Court should not have based its judgment either wholely [*sic*] or partially upon laches where that affirmative defense had never been set forth by the defendants in their pleadings." This assertion obviously relies upon an unstated general principle of law that a trial court may *never* properly base a judgment on an affirmative defense unless the affirmative defense has been raised by the defendants in their pleadings. Such a general principle is not a true statement of the law. A correct statement of the law in this area is found in 2 Moore, *Federal Practice* (2d. ed.), at page 1853:

> If an affirmative defense is not pleaded it is waived to the extent that the party who should have pleaded the affirmative defense may not introduce evidence in support thereof, unless the adverse party makes no objection in which case the issues are enlarged, or unless an amendment to set forth the affirmative defense is properly made.
>
> Failure to plead matter which constitutes an affirmative defense does not, however, preclude a party from taking advantage of the opposing party's proof, if such proof establishes the defense. Thus, although illegality is normally an affirmative defense, if the illegality appears on the face of the contract, or from plaintiff's proof, the defendant may take advantage of it by proper motion, and if necessary the court will raise the objection itself. [Omitted are footnotes citing cases where the affirmative defenses of contributory negligence and illegality of a contract were

shown in plaintiff's case and the court granted judgment for defendant at the close of plaintiff's case even though defendant had not pleaded the defense.]

It is submitted that the record in this case shows adequate support for the trial judge's finding that appellant was guilty of laches in pursuing any claim he might have as a result of the alleged coercion. The first time he made such an assertion was 14 months after the alleged coercion had occurred and 11 months after his resignation had become effective. It is assumed that prejudice to the Government results from delay in seeking one's remedy in the proper forum for an allegedely illegal separation from government employment. In almost all such cases, if the allegation of illegal separation is ultimately determined to be well founded the Government will be required to pay two salaries for the services necessary to carry out the duties of one position. Because of his legal education and personal experience appellant can properly be charged with knowledge that he was required to pursue his remedies promptly.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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